U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 16 2013

OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b) (2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b) (2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and motion to reconsider. The AAO will grant the motion to reopen and motion to reconsider and affirm the previous decisions of the director and the AAO. The petition remains denied.

The petitioner is a beef and dairy farm. It sought to employ the beneficiary permanently in the United States as an animal scientist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director denied the petition on March 25, 2009, concluding that the petitioner had failed to establish its continuing financial ability to pay the proffered wage.[1] On September 15, 2011, the AAO dismissed the appeal[2] and affirmed the director's denial, determining that the petitioner had failed to demonstrate that it has had the continuing ability to pay the proffered wage, and additionally noting that the educational documents had not been accompanied by specific English translations that comply with the terms of 8 C.F.R. § 103.2(b)(3), which provides as follows:[3]

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

It is noted that on motion, the petitioner has provided another English translation, dated October 12, 2011. However, it still does not comply with the regulation at 8 C.F.R. § 103.2(b)(3) because it fails to certify that the translator is competent to translate from the foreign language into English.

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[1] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

[2] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[3] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As indicated above, on October 17, 2011, the petitioner, through current counsel, filed a motion to reconsider and to reopen. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The AAO will accept the petitioner's motion as a motion to reopen and reconsider.

As indicated in the AAO's prior decision, the petitioner's operating agreement and the state corporation online records,[4] indicate that the petitioner registered as a limited liability company on March 21, 2002. The operating agreement indicated that the two members of the petitioner's LLC were the and the

Included with the motion, relevant to the petitioner's ability to pay the proffered wage, current counsel submits information in the form of a letter, dated October 10, 2011, from indicating that with the death of her husband in 2004, his living trust's interests had been transferred to the petitioner's LLC. The letter then states that the is the only member of the petitioning LLC. According to the petitioner's financial information is contained in Schedule F of her personal income tax return. It is considered as a disregarded entity. states there is no separate tax return or tax return requirement for the petitioner. She also states that the is also considered a disregarded entity and further adds that she has been willing and is willing to allocate her assets and income toward the beneficiary's proffered salary of $48,100 per year.

It is noted that the priority date of the petition is November 27, 2007. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also show that it has had the continuing ability to pay the proffered wage from the priority date onward. In some cases, the overall circumstances of the petitioner's business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In its previous decision the AAO explained the process of reviewing a petitioner's ability to pay the proffered wage to a beneficiary. In that case, it reviewed a copy of a W-2 that the petitioner had provided for 2007, which reflected that it paid $35,309.91 in wages to the beneficiary,

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[4] *See* Wisconsin Department of Financial Institutions online business entity search records at (Accessed August 24, 2011). It also showed that is registered as a separate entity.

amounting to $12,790 less than the proffered wage. The AAO also discussed the petitioner's bank statements and whether housing or the beneficiary's health insurance could be included in the consideration whether the petitioner had established its ability to pay the proffered wage.[5]

With counsel's motion, complete copies of Form 1040, U.S. Individual Income Tax Return for 2007, 2008, 2009, and 2010 have been submitted. Also submitted is another copy of the 2002 operating agreement of the LLC, a copy of the IRS notice assigning the employer identification number to the petitioner, copies of three articles related to the state of Wisconsin agriculture in the past three years, copies of Form 943, Employer's Annual Federal Tax Return for Agricultural Employees for 2007, 2008, 2009, and 2010, which show cumulative wages paid and cumulative withholdings for workers and which were filed by the petitioner using its EIN as indicated above, and copies of the cancelled certificate of membership of the in the petitioner's LLC.

Counsel asserts that IRS tax structure requires that the single member limited liability company should be treated as a sole proprietorship. Counsel argues that personal income, assets and liabilities should be included in the review of the petitioner's ability to pay the proffered wage. In a footnote, counsel states that the discrepancy noted in the AAO's prior decision relevant to the EIN number given on Schedule F of partial copy of her 2007 personal income tax return as instead of the one set forth on the Form I-140, the ETA Form 9089 and the copies of the Form 943 submitted on motion, "was assigned to her upon her husband's death when the Farm changed from a partnership to sole proprietorship." No evidence of this assignment was submitted. death occurred in 2004, yet the primary evidence of the petitioner's net income continued to be reported under a different EIN than its payment of wages and withholdings and its filing of documents with DOL and USCIS in 2007. Without documentation, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As noted above, the record contains Form 943, Employer's Annual Federal Tax Return for Agricultural Employees for 2009, which utilizes the tax identification number listed on the ETA Form 9089. This additionally conflicts with counsel's claims on motion. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

At the outset, it is noted that the Wis. Stat. § 183.01 et. Seq., allows for the creation of a business entity providing limited liability, flow-through taxation and simplicity. *See Gottsacker v. Monnier*, 281 Wis.2d 361, 372, 697 N.W.2d 436 (2005). A limited liability company is a business entity that possesses both corporate characteristics and traits associated with a partnership. *Id.* The debts, obligations and

[5] Those issues have not been renewed in counsel's motion.

liabilities of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company. *See* Wis. Stat. § 183.0304(1); *see also* 6.02 of Article VI of the petitioner's operating agreement.

As noted in the AAO's prior decision, a single-member LLC may be treated as sole proprietorship for tax filing purposes (unless it elects to be treated as a corporation), it does not change the fact that the business is a limited liability company. If the only member of the LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C.E. or F. *See* IRS Publication 3402 (Rev. 7-200) Catalog Number 249400 "Tax Issues for Limited Liability Companies." Members are like shareholders of a corporation and own an interest in the LLC but they are not the LLC. Property interests may be acquired by the LLC and the title acquired vests in the LLC. *See HB Management, LLC v. Brooks*, 2005 WL 225993 (D.C. Super. Ct.); *see also* McKinney's Limited Liability Company Law § 609(a)(members and managers of limited liability companies are generally expressly exempt from personal responsibility for a company's obligations). Further, USCIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the proffered wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713.

In this case the petitioner is a farm. On Schedule F, USCIS considers line 36 to contain the LLC's net income for the relevant year. In this case, the net income shown on line 36 of personal income tax returns for 2007 through 2010 is shown as follows:

2007 net income	$ 277,598
2008 net income	-$ 499,461
2009 net income	-$1,485,923
2010 net income	-$ 508,989

As is shown above, except for 2007, each year is reflected as a loss. But as stated in the AAO's prior decision, and as set forth above the IRS tax numbers are different on Schedule F from the other EIN used by the petitioner. Each Schedule F of returns states that the IRS EIN of the principal product represented by counsel and as the petitioning business is not the tax number represented to be the petitioner's on the Form I-140, the ETA 9089 or the copies of the Form 943 submitted on motion. Counsel claims the petitioner holds both EINS and was assigned both EINS by the IRS. As stated above, without documentation, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Pursuant to the regulation at 20 C.F.R. § 656.3, "An employer must possess a valid Federal Employer Identification Number (FEIN)." If the two companies have separate tax identification numbers, they would considered to be separate employers. In this case, regardless of any affiliation, and without specific objective documentation that the petitioner holds two EINS simultaneously, Schedule F of the tax returns identifying an entity with a different FEIN or EIN will not be considered in reviewing the petitioner's ability to pay the proffered wage because it

represents separate entities. As stated above, in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the petitioner has not established that it could cover the difference between the proffered wage of $48,100 and the actual wages of $35,309.91 paid to the beneficiary in 2007. Nor has the petitioner established that it could pay the full proffered wage in 2008, 2009, or 2010.[6]

As alternative method of reviewing a petitioner's ability to pay the proffered wage, USCIS may examine a petitioner's net current assets, which represent the difference between net assets and net liabilities for a given period.[7] Net current assets represent a readily available resource out of which the proffered wage may be paid. Generally, net current assets are represented by an income tax return's balance sheet schedule, which identifies current and total assets and current and total liabilities. However, they are not identified on an individual Form 1040 as is contained in the instant record. Moreover, the petitioner has not provided any audited financial statements which would show net current assets for a given period. It is noted that counsel states on motion that the petitioner's "Farm net assets" are shown on asset reports attached to the respective tax returns. Counsel lists some numbers but does not identify specifically where these numbers are within the "asset reports." It is noted that the tax returns have "federal asset reports" attached to them, but there is no indication that they represent net current assets such as discussed above, rather than a listing of the petitioner's total depreciable assets, which would not be part of a calculation of a petitioner's net current assets.

In some cases, USCIS may consider the overall circumstances of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The

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[6] No W-2s issued to the beneficiary in 2008, 2009, or 2010 were submitted on motion.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner was a fashion designer whose work had been featured in and magazines. Her clients included movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the instant case, counsel submits a copy of another non-precedential AAO case adjudicated in 2009. The AAO is not bound by this case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS, formerly the Service or INS, are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Here, counsel uses individual total income figures to assert that the petition merits approval. Notwithstanding personal guarantee, which was not submitted until motion, the AAO finds that line 36 of Schedule F, Profit or Loss from Farming is the appropriate measure in this case. As also stated above, the petitioner failed to document that how the IRS has assigned it two EINS to use simultaneously. The petitioner also failed to submit any audited financial statements or annual reports (supported by audited financial statements) pursuant to 8 C.F.R. 204.5(g)(2) that would show net current assets. Therefore, the AAO cannot assess its ability to pay the proffered wage using net income or net current assets. Even if the net income figures of Schedule F were considered, only 2007 showed a net profit. All of the other years reflected net losses. Although the petitioner has employed 29 to 30 workers in the past, considering the overall circumstances of the petitioner and the documentation submitted in the current record, the AAO does not find that the petition merits approval.

Based on the foregoing, the petitioner has failed to establish that it has had the *continuing* ability to pay the beneficiary the required wage from the priority date until the time of adjustment.

The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated September 15, 2011, is affirmed. The petition remains denied. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated September 15, 2011, is affirmed. The petition remains denied.